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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

Y. E. HILLIARD et al.,

Plaintiffs and Appellants,

v.

BRAEMER PARTNERSHIP,

Defendant and Respondent.

D042320

(Super. Ct. No. GIC780368)

APPEAL from a judgment of the Superior Court of San Diego County, William C. Pate, Judge. Affirmed.

Plaintiffs and Appellants Y. E. Hilliard and Roach Ward sued Defendant and Respondent Braemer Partnership, doing business as Catamaran Resort Hotel, for damages arising from alleged racial discrimination and emotional distress. A jury returned a special verdict finding no discrimination on the basis of race against either plaintiff and awarding no damages. When the jurors were polled in open court, however, the court reporter transcribed eight negative and four affirmative answers to the question

of whether the Catamaran Resort Hotel discriminated against appellants on the basis of their race. Although appellants raised no objection in the trial court, they now contend they were deprived of their state constitutional and statutory rights to a verdict of three-fourths of the jury. For reasons explained in this decision, we find the issue has been waived. Accordingly, we affirm the judgment.

### DISCUSSION

We are presented with a conflict between the reporter's transcript, which reflects a vote of eight-to-four against appellants, and the clerk's transcript, which reflects a vote of nine-to-three against appellants. If we were to reach the merits of this issue we would be required to harmonize the conflict in the record if possible. (*People v. Smith* (1983) 33 Cal.3d 596, 599.) This task would not be difficult under the circumstances. None of the 17 or more people who were in the courtroom at the time the jury was polled, including the judge, the clerk, twelve jurors, two counsel and appellant Hilliard objected to or commented on the clerk's statement, "I have recorded nine negative responses." The only reasonable inference to be drawn from this situation is that the verdict actually was, as appellants acknowledged in their motion for new trial on a different ground, "split 9-3."

We need not reach the issue, however, because appellants forfeited it by failing to object in the trial court. (Code Civ. Proc., § 619; *Brown v. Regan* (1938) 10 Cal.2d 519, 523.) Appellants acknowledge this failure, but argue the issue has not been waived because there was "confusion among all involved in rendering this verdict." The record supports the inference that the only person who may have been "confused" was the court

reporter. After listening to the poll, the clerk clearly announced the verdict to be nine to three, and the court clearly accepted that verdict. If anyone was confused about the verdict, this state of affairs could have been corrected easily by bringing it to the attention of the trial court, but no one did.

Under these circumstances, no injustice results from applying the rule of forfeiture in this case. As the California Supreme Court explained in *Henriouille v. Marin Ventures, Inc.* (1978) 20 Cal.3d 512, 521: "Failure to object to a verdict before the discharge of a jury and to request clarification or further deliberation precludes a party from later questioning the validity of that verdict if the alleged defect was apparent at the time the verdict was rendered and could have been corrected."

#### DISPOSITION

For the foregoing reasons, the judgment is affirmed.

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IRION, J.

WE CONCUR:

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McINTYRE, Acting P. J.

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O'ROURKE, J.